IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE SIDE

APPEAL FROM ORDER NO.43 OF 1998

Kusumkant T. Nagda
residing at 13, Nagda Niketan
Cama Lane, Hansoti Road,
Ghatkopar Bombay-86 ... Appellant

V/s.

Mariam Bi Wd/o. Ebrahim
Nagda Niketan, Cama Lane
Hansoti Road, Ghatkopar
Bombay - 400 086 ... Respondent

Mr.R.A. Thorat with Mr.Vishwas Deokar for Appellant
Mr.T.D. Singh for Respondent

CORAM: **SMT.NISHITA MHATRE, J.**

DATED: **OCTOBER 5, 2004**

ORAL JUDGMENT:

. This Appeal from Order has been filed against the order of the trial Court returning the plaint to the plaintiff, the appellant herein, under Order 7 Rule 10 of the Code of Civil Procedure for presenting the same before the proper Court. The trial Court has held that the suit was not maintainable and the jurisdiction to decide the issues raised was only with Small Causes Court under section 28 of the Bombay Rent Act.

2. The suit has been filed for the following reliefs:

(a) that the Hon'ble Court be pleased to declare the Defendant and her family members as the trespassers in respect of structure admeasuring 6.75 metres X 1.6 metres equivalent to 10.8 sq.metres equivalent to 108 sq.ft. or thereabouts, so made unauthorisedly in the compound of Nagda Niketan, situated, lying and being at Hansoti Road, Cama Lane, Ghatkopar, Bombay - 400 086;

(b) That defendant, her family members be directed by an order and decree to remove themselves alongwith all other goods, things and articles from the suit property or any portion thereof and to hand over the vacant, quiet and peaceful possession of the same to the Plaintiff;

(c) that this Hon'ble Court be further pleased to direct the Defendant by an order and decree to pay a sum of Rs.24,000/- being the arrears of mesne profit for the last 10 years' unauthorised use and occupation of suit structure as per particulars of claim, Exhibit "B" hereto; and to further pay a sum of Rs.200/- per month as mesne profit from the date of filing of suit till defendant hands over peaceful physical and vacant possession to the Plaintiff;

(d) pending the hearing and final disposal of the suit, the Defendant, her family members, agents, persons claiming through her be restrained by an order and injunction from not to further encroach upon suit property or any portion thereof and/or also from inducting any third party and/or also from inducting any third party and/or parting with possession, encumbering, alienating and/or doing any act, deed or thing so as to jeopardise and Plaintiff's right, title and interest in respect of suit property and causing nuisance and annoyance to other occupants of suit property;

(e) Interim and ad-interim reliefs in terms of prayers (c) and (d) above;

(f) Cost of suit be provided for;

(g) any other and further reliefs be granted which this Hon’ble Court deems fit and proper in the circumstances.

3. It appears that a Notice of Motion was filed for interim relief by the appellant (the original plaintiff). A defense was taken by the respondent i.e., the original defendant, that the City Civil Court has no jurisdiction to entertain the suit and that the preliminary issue regarding jurisdiction be decided first under section 9A of the CPC. It appears that without deciding this issue regarding jurisdiction, the trial Court disposed of the Notice of Motion by passing certain orders. Admittedly, the respondent has not raised any objection for this procedure being followed.

4. After the pleadings were complete, the trial Court framed various issues including the first issue "Does the defendant prove that the jurisdiction of this Court is barred by Section 28 of Bombay Rent Control Act and by Small Causes Court’s Act?". This issue has been decided in the affirmative after the evidence was led on all issues and arguments were concluded. The trial Court has on the basis of the evidence led before it come to the conclusion that this was a dispute between the landlord and his tenant and assuming the defendant was a trespasser, it was a dispute which could be

decided only by the Small Causes Court as laid down under the provisions of Section 28 of the Bombay Rent Act. Accordingly, all other issues were not answered and the complaint was returned for presentation in the proper Court.

5. On behalf of the appellant, Mr.Thorat submits that the issue regarding jurisdiction could have been tried as a preliminary issue under section 9A, before the Notice of Motion came to be made absolute. It is also submitted that once the Notice of Motion was made absolute, the stage for deciding the issue regarding jurisdiction was passed and therefore, the entire suit was required to be decided on merits. He submits assuming for the sake of argument that such an order could have been passed under Order 14 Rule 2, the Court having not passed the order under that provision of law, the impugned order was not sustainable. He submits under Order 14 Rule 2, the Court is to decide a case on all issues and not just the preliminary issue. Under sub-rule 2, the Court may decide an issue in respect of jurisdiction if the Court opines that it can be decided only as a question of law. The learned Advocate urges that an issue as to whether the respondent is a tenant or not is a question of fact and, therefore, such an issue must be decided under section 9A and not under Order 14 Rule 2. He relies on the judgments in the case

of *Vishwanath Sawant v/s. Jandabhai Kikabhai,* **1990 Mah. R.C.J. 273** where this Court has held that in the case of the defendant being a trespasser, the Court of Small Causes has no jurisdiction to entertain the suit between the plaintiff and the defendant and it would only be the City Civil Court which could entertain such a suit. He further relied on the judgment in the case of *Abdulla Bin Ali & Ors. v/s. Galappa & Ors.,* **AIR 1985 SC 577** in support of his submission that the jurisdiction of a Court is to be determined on the basis of the averments contained in the plaint. According to the learned Advocate, the plaint discloses no such contention that there is relationship between the plaintiff and the defendant as landlord and tenant or such a relationship is in dispute. He further relies on the judgment in the case of *Vannattankandy Ibrayi v/s. Kunhabdulla Hajee*, **(2001) SCC 564** to submit that assuming for the sake of argument, that it was a tenancy in favour of the defendant, his tenancy has come to an end because admittedly, the premises of which the tenancy is claimed were demolished and, therefore, the defendant had no right to claim tenancy.

6. Mr.Singh, appearing on behalf of the Respondent, candidly submitted that the stage at which the preliminary issue regarding jurisdiction of the Court is to be decided was at a stage prior to the Motion being

heard. However, he urges that under Order 14 Rule 2, the Court could always decide the issue of jurisdiction without deciding the other issues since this was an issue of question of law.

7. It is obvious from the pleadings contained in the plaint and the reliefs sought for in the plaint that the plaintiff has filed a suit for declaration of trespass and for possession. The relief further sought for was against the removal of goods and other articles from the suit property and for a decree for payment of Rs.24,000/- being the arrears of mesne profits for regularisation and occupation of the suit structure constructed unauthorisedly by the defendant. Obviously, therefore, there is no averment contained in the plaint regarding tenancy. The allegation is that the defendant has committed trespass on the suit premises and, therefore, certain declarations have been sought. As held by the Apex Court in the case of *Abdulla Bin Ali* (supra), the jurisdiction of a Court has to be determined only on the basis of the allegations contained in the plaint. The case before the Supreme Court was that the landlord had filed a suit for possession and mesne profits in the Civil Court alleging that the defendant was a trespasser. The defendant took a plea that Civil Court had no jurisdiction to entertain the suit as he was the tenant. The Apex Court held that

the landlord cannot be non suited in the Civil Court on the ground that he had not claimed a declaration of title. The facts in the present case are very similar. The suit is for possession and mesne profits. The Small Causes Court therefore will have no jurisdiction to entertain and try such a suit. The relationship of landlord and tenant is not in question and therefore the provisions of section 28 of the Rent Act cannot be invoked.

8. Furthermore, as held by this Court in the case of *Vishwanath Sawant* (supra), the issue as to whether a person is a trespasser can be decided only by the City Civil Court and not the Small Causes Court. Therefore, the Small Causes Court has no jurisdiction to try such an issue. The trial Court was, accordingly, clearly in error in returning the plaint.

9. Even under Order 14 Rule 2 of the Code of Civil Procedure, the trial Court could have considered the question of jurisdiction as a preliminary issue although all other issues have been framed only if it had found it related to the issue of law only. In such circumstances, all other issues are to be settled later, after the issue of jurisdiction is determined. In the present case, the trial Court has not adopted even this procedure as laid down under Order 14 Rule 2 and instead

the trial Court has framed all issues including the issues relating to the merits of the case. The parties have been permitted to lead evidence in regard to all issues. It is only at the stage of writing the order that the trial Court has confined its decision to only first issue, that of jurisdiction. In my view, it is clearly an erroneous procedure adopted by the Court. The trial Court ought to have decided all issues since evidence had been led on all issues which had been framed together. The stage of deciding the preliminary issue under section 9A had long gone by and it was, therefore, erroneous on the part of the trial Court to return the plaint without deciding the other issues framed by it.

10. Accordingly, the impugned order is set aside. The trial Court will decide all issues simultaneously since the evidence is complete the trial Court will hear the arguments on the basis of the pleadings and evidence already before it and decide the suit by March 2005. The parties are expected to cooperate in order to dispose of the suit expeditiously.

11. Appeal from Order stands disposed of.

12. Writ to go down forthwith.